IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 19-30197

RENATA SINGLETON; MARC MITCHELL; LAZONIA BAHAM; TIFFANY LACROIX; FAYONA BAILEY; SILENCE IS VIOLENCE; JANE DOE; JOHN ROE,

Plaintiffs-Appellees

v.

LEON A. CANNIZZARO, JR., in his official capacity as District Attorney of Orleans Parish and in his individual capacity; DAVID PIPES; IAIN DOVER; JASON NAPOLI; ARTHUR MITCHELL; TIFFANY TUCKER; MICHAEL TRUMMEL; INGA PETROVICH; LAURA RODRIGUE; MATTHEW HAMILTON; GRAYMOND MARTIN; SARAH DAWKINS,

Defendants-Appellants

On Appeal from the United States District Court, Eastern District of Louisiana, No. 2:17-cv-10721, Honorable Jane Triche Milazzo, Presiding

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BRIEF FOR THE LOUISIANA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Case No. 19-30197

The undersigned counsel of record certifies that all of the interested persons and entities described in the fourth sentence of Rule 28.2.1 who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the brief of Defendants-Appellants, except for the following listed persons and entities. These representations are made in order that the judges of this Court may evaluate possible disqualification.

1. The Louisiana District Attorneys Association (LDAA), a proposed amicus curiae.
2. E. Pete Adams and Loren Lampert, counsel for the Louisiana District Attorney's Association.

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INTERESTS OF AMICUS CURIAE

The Louisiana District Attorneys Association ("LDAA") is a Louisiana nonprofit corporation which includes as members all of the forty-two District Attorneys of the State of Louisiana. The issue before this Honorable Court implicates the scope and application of the well-established and long-standing doctrine of absolute prosecutorial immunity. The LDAA has a substantial interest in ensuring that absolute prosecutorial immunity be maintained in order to ensure that the independent judgment of prosecutors acting in their role as advocates is fully protected in furtherance of the efficient and effective functioning of the criminal justice system.[1]

SUMMARY OF THE ARGUMENT

Absolute immunity is crucial to safeguarding the independent judgment of prosecutors in their role as advocates in the criminal justice process. Any ruling that alters or diminishes the scope of absolute immunity compromises the ability of district attorneys and assistant district attorneys to fulfill their responsibilities to serve the public interest and presents a substantial risk of adversely affecting the proper functioning of the criminal justice system. Absolute immunity is applicable

[1] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel certify that this brief was not authored in whole or part by counsel for any of the parties and that no one other than the LDAA, its members, and its counsel contributed money intended to fund the preparation or submission of the brief.

to actions undertaken by prosecutors in the preparation and pursuit of a criminal prosecution. Amicus respectfully submits that the portions of the ruling that effectively conclude to the contrary in this case conflict with well-established precedent and are detrimental to the fair and impartial administration of criminal justice.

ARGUMENT

The *Joint Brief of Appellants* ably addressed the substantial importance to the criminal justice system of absolute immunity for district attorneys and assistant district attorneys. Amicus files the instant brief to reiterate both the compelling policy upon which the doctrine of absolute immunity for prosecutors is founded and the serious implications of the district court ruling, which ignores and conflicts with long-standing precedent and would serve to erode such immunity.

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), "[r]elying in part on common-law precedent, and perhaps even more importantly on the policy considerations underlying that precedent," the United States Supreme Court concluded that "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution was not amenable to suit under § 1983." *Kalina v. Fletcher*, 522 U.S. 118, 123-24, 118 S.Ct. 502, 506, 139 L.Ed.2d 471 (1997) (internal quotation marks omitted). *Imbler* accorded prosecutors "absolute immunity when [their] actions are 'intimately associated with the judicial

phase of the criminal process.'" *Loupe v. O'Bannon*, 824 F.3d 534, 538 (5th Cir.2016), quoting *Imbler*, 424 U.S. at 430, 96 S.Ct. 984. Cases since *Imbler* have consistently recognized that prosecutors are "fully protected by absolute immunity when performing the traditional functions of an advocate." *Kalina*, 522 U.S. 118, 131, citing *Imbler*, 424 U.S. at 431; *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S.Ct. 2606, 2615-16, 125 L.Ed.2d 209 (1993). The determination that absolute immunity applied to such functions resulted from "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler*, 424 U.S. at 421. In regard to the analysis, the Supreme Court explained:

> We take what has been termed a "functional approach." We consult the common law to identify those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they are performed " 'with independence and without fear of consequences.' " Taking this approach, we have identified the following functions that are absolutely immune from liability for damages under § 1983: actions taken by legislators within the legitimate scope of legislative authority; actions taken by judges within the legitimate scope of judicial authority; actions taken by prosecutors in their role as advocates; and the giving of testimony by witnesses at trial.

Rehberg v. Paulk, 566 U.S. 356, 363, 132 S.Ct. 1497, 1503, 182 L.Ed.2d 593 (2012) (internal citations omitted). The inclusion of prosecutors among those to whom

actual immunity extends was and continues to be well-founded.[2]

If prosecutors were to be subjected to liability under § 1983, "[t]he ultimate fairness of the operation of the [criminal justice] system itself could be weakened." *Imbler*, 424 U.S. at 427. As observed by the *Imbler* Court:

> If a prosecutor had only a qualified immunity, the threat of 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. *Cf. Bradley v. Fisher*, 13 Wall., at 348, 20 L.Ed. 646; *Pierson v. Ray*, 386 U.S., at 554, 87 S.Ct., at 1217. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Imbler, 424 U.S. 409-10. Prosecutors "[f]requently act[] under serious constraints of time and even information" and "inevitably make[] many decisions that could engender colorable claims of constitutional deprivation," and "[d]efending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and

[2] Louisiana law also accords absolute immunity to prosecutors "acting within the scope of [their] prosecutorial duties as an advocate for the state" as to "conduct intimately associated with the judicial phase of the criminal process." *Knapper v. Connick*, 96-0434 (La. 10/15/96); 681 So.2d 944, 951.

trials." *Id.* at 425-26. As observed in *Van de Kamp v. Goldstein*, "[i]mmunity does not exist to help prosecutors in the easy case; it exists because the easy cases bring difficult cases in their wake… as *Imbler* pointed out, the likely presence of too many difficult cases threatens, not prosecutors, but the public, for the reason that it threatens to undermine the necessary independence and integrity of the prosecutorial decisionmaking process." 555 U.S. 335, 349, 129 S.Ct. 855, 864, 172 L.Ed.2d 706 (2009).

In the absence of immunity, "the specter of litigation could undermine prosecutors' ability to exercise their independent judgment with respect to the initiation and conduct of criminal proceedings." *Cousin v. Small*, 325 F.3d 627, 635 (5th Cir.2003), citing *Imbler*, 424 U.S. at 422-28. The undesirable consequences of such a potential chilling influence is apparent, as "[a]ttaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence." *Imbler*, 424 U.S. at 426. Absolute immunity addresses the concern that "[h]arassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 422-423.

In according prosecutors absolute immunity in their role as advocates, the

Supreme Court was fully cognizant that such immunity comes at a cost and "does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," but concluded that "the alternative of qualifying a prosecutor's immunity would disserve the broader public interest." *Imbler*, 424 U.S. at 427. The considerations identified in *Imbler* that weighed in favor of absolute immunity for prosecutors remain compelling to this day. Furthermore, the concerns militate against any derogation of absolute prosecutorial immunity such as occurred in this case in the Court below.

Prosecutors perform a critical function in this nation of laws. While other attorneys act in furtherance of the legal interests of a particular client, the prosecutor stands as an advocate for the interests of justice. *See Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935) (recognizing that the interest of a prosecutor is "not that [he] shall win a case, but that justice shall be done"). The judicial system relies in no small part on the ability of the prosecutor to faithfully and independently discharge his duties. A prosecutor's ability to do so is critically undermined by any ruling that fails to accord the protection of absolute prosecutorial immunity warranted by judicial precedent.

The Supreme Court has long recognized that "[t]he office of public prosecutor is one which must be administered with courage and independence." *Imbler*, 424 U.S. at 423, quoting *Pearson v. Reed*, 6 Cal.App.2d 277, 287, 44 P.2d 592, 597

(1935) (internal quotation marks omitted). Should the district court's denial of immunity be upheld in this case, prosecutors will be required to evaluate every step in the prosecution of a case not only as public officials charged with ensuring that justice is done but also as individuals concerned with the potential attachment of civil liability for any misstep or lapse in judgment that may occur during the process. The judicial system would invariably suffer, as even the most dedicated and experienced servants of the law would falter if faced with such a daunting prospect.[3]

Moreover, the potential that persons dissatisfied with the criminal justice process will engage in abusive civil litigation practices remains a significant concern. The adversarial system "necessarily permit[s]" prosecutors to be "zealous in their enforcement of the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248, 100

[3] In his dissent in *Johnson v. Kegans*, Judge Goldberg delineated a number of concerns associated with "the world in which judges and prosecutors would live if they were not entitled to absolute immunity in the circumstances of [the] case." 870 F.2d 992, 1004 (5th Cir.1989) (Goldberg, J., dissenting). In his lengthy discussion, Judge Goldberg recognized that embroiling judges and prosecutors in civil lawsuits "poses a grave systemic problem" and observed in part that:

> ...If a judge or prosecutor faces numerous lawsuits like this one that she must defend, the quality of her decisionmaking during the adjudication of pending and future cases, and during sentencing, will be adversely affected. Prisoners could effectively intimidate judges and prosecutors from acting with the utter independence that their proper decisionmaking requires. The judge or prosecutor faced with such litigation would understandably keep an eye fixed on the possibility that a defendant on trial may later sue or harass the judge or prosecutor if her actions appear too harsh. Prosecutorial tactics before and during trial, judicial rulings before and during trial and judicial sentencing decisions would all be adversely affected. "The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication." *Forrester*, 108 S.Ct. at 544.

Id.

S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980). The erosion of absolute prosecutorial immunity would permit an individual or organization hostile to a prosecutor's mission to weaponize that opposition in the form of a § 1983 suit. A civil lawsuit would become a systemic means of harassment to deter or punish a prosecutor engaged in the vigorous performance of his duties. By shielding district attorneys and assistant district attorneys from such abusive tactics, absolute immunity permits prosecutors to act in furtherance of the truth-seeking function of the adversarial system. In this regard, the doctrine of absolute immunity is crucial to maintaining public confidence in the judicial process.

In summary, the importance of absolute prosecutorial immunity to the efficient and effective administration of criminal justice remains paramount. The Supreme Court's steadfast adherence to its holding in *Imbler* demonstrates that the risk of an adverse effect on the judicial system is far too great to countenance an erosion of such immunity. Therefore, Amicus respectfully submits that the district court ruling in this case, to the extent that it fails to accord prosecutors the full and applicable protection of absolute immunity, should not stand.

CONCLUSION

The Louisiana District Attorneys Association as amicus curiae respectfully requests that this Honorable Court reverse the ruling of the district court denying in part the motion to dismiss filed by Defendants-Appellants.

Respectfully submitted,

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CERTIFCATE OF SERVICE

I certify that on the 8th day of May, 2019, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

s/ Loren Lampert
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 2,091 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman, Font Size 14.

By:s/ Loren Lampert
Loren Lampert #24822

May 8, 2019
DATE